83-1025

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LINDA L. HEFFELFINGER, Administratrix of the Estate of George R. Heffelfinger, Deceased and LINDA L. HEFFELFINGER, in Her Own Right,
Respondent

v.

STONE & WEBSTER ENGINEERING CORPORATION, et al.,
Petitioner

EMMA F. STAHLER, Administratrix of the Estate of Leonard R. Stahler, Sr., Deceased and EMMA F. STAHLER, in Her Own Right,
Respondent

v.

STONE & WEBSTER ENGINEERING CORPORATION, et al.,
Petitioner

HARRY SCOTT FETTERMAN,
Respondent

v.

STONE & WEBSTER ENGINEERING CORPORATION, et al.,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the mandatory application of Pennsylvania Rule of Civil Procedure 238, providing for mandated sanctions for delay formulated as interest on a judgment, predating the judgment, deprive the Petitioner of substantive guaranteed rights and protections under the equal protection and due process clauses of the United States Constitution?

2. Was Petitioner unfairly prejudiced and denied due process by the trial court's order of a non-bifurcated retrial coupled with the refusal to reinstate the co-defendant as a party when the bifurcated first trial resulted in a mistrial for want of a jury verdict, thereby further preventing a jury trial on co-defendant's culpability?

3. Does the Pennsylvania Workmen's

Compensation Act provision barring any consideration of the employers conduct as causative of an employee's harm directly conflict with Federal Rule of Civil Procedure Rule 19(a) providing for the joinder of persons necessary for a just adjudication?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

1. Linda L. Heffelfinger, et al. v. Stone & Webster Engineering Corporation, Civil

Action No. 79-1140; Emma F. Stahler, et al. v. Stone & Webster Engineering Corporation, Civil Action No. 79-1141; Harry Scott Fetterman v. Stone & Webster Engineering Corporation, Civil Action No. 79-3769; United States District Court for the Eastern District of Pennsylvania, filed January 22, 1982 and entered January 25, 1982.

2. Heffelfinger v. Stone & Webster Engineering Corporation; Stahler v. Stone & Webster Engineering Corporation; Fetterman v. Stone & Webster Engineering Corporation, No. 82-1131 (3d Cir. Oct. 11, 1983).

3. Heffelfinger v. Stone & Webster Engineering Corporation; Stahler v. Stone & Webster Engineering Corporation; Fetterman v. Stone & Webster Engineering Corporation, No. 82-1131 (3d Cir. Nov. 14, 1983). (Order denying Petition for Rehearing).

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was dated January 22, 1982.

An order denying Petition for Rehearing was dated November 14, 1983.

Jurisdiction is conferred on this Court to review by certiorari the judgment of the Court of Appeals by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Fed.R.Civ.P. 19:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

* * * *

Pa.R.Civ.P. 238:

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage.

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointred under the Arbitration Act of June 16, 1836, P.L. 715, as amended, 5 P.S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

* * *

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continued that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay for the period after the date the offer was made.

* * *

STATEMENT OF THE CASE

In 1966, Stone & Webster Engineering Corporation (hereinafter "Petitioner"), an engineering concern, was engaged by Hart Metals, Inc. (hereinafter "HMI") to design and engineer a magnesium production facility for military application. As designed, the facility encompassed a pneumatic conveyancing system for the distribution of highly flammable magnesium powder from one point in the production process to another. That system was designed and manufactured by co-defendant, Shick Tube-Veyor Corporation (hereinafter "co-defendant").

On August 18, 1978, three HMI workmen were engaged in removing one component of co-defendant's pneumatic conveyancing system from a pit in which it was situated. The component fell, and an explosion and fire ensued. As a result of

this accident, the underlying lawsuit was filed against Petitioner and co-defendant in the United States District Court for the Eastern District of Pennsylvania based upon diversity jurisdiction.

There were two complete trials of the matter. Near the close of the first, bifurcated trial, Petitioner's co-defendant was granted a directed verdict as to the claims of plaintiffs and the cross-claim of Petitioner. [1] Petitioner's culpability for the accident then went to the jury. However, the evidence adduced at the first, bifurcated trial rendered the jury unable to agree as to liability of Petitioner. An informal poll of the jurors of the first trial, after the

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[1] The bifurcated trial format excluded the introduction of gruesome photographs of one of the burn victims during the liability portion of the trial.

fourth day of deliberation, indicated that seven of the jurors favored exonerating Petitioner.

The jurors' disagreement necessitated a second trial, but the trial court refused to reinstate Petitioner's co-defendant as a party in the second trial. The trial court also ordered the second trial to be changed to a non-bifurcated setting and permitted the introduction of the gruesome photographs of the burned victims. During the second trial that was conducted in the absence of Petitioner's co-defendant and in a non-bifurcated manner wherein the gruesome photographs were shown to the jury before and after their deliberation on the liability issues, the jurors returned a verdict in favor of plaintiffs. The trial court further found that plaintiffs were automatically entitled to delay damages under Pennsylvania Rule of Civil Procedure 238. Also, the trial court

refused to allow Petitioner to join plaintiff's and plaintiffs' decedents' employer, HMI, as an involuntary plaintiff pursuant to Federal Rule of Civil Procedure 19(a) for purposes of placing the issue of the causal negligence of the employer before the jury.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

The mandatory and automatic award of sanctions for delay without a consideration of those factors comprising "good faith" deprives a defendant of property without due process and denies equal protection of the laws. Unlike pre-judgment interest statutes in other jurisdictions which are designed to make an injured party whole by compensating that party for the loss of use of money, Pennsylvania Rule of Civil Procedure 238 authorizes the award of damages for delay as a sanction for a defendant's failure to negotiate a settlement in and for the good faith purpose of lessening congestion in the courts.

Pennsylvania Rule of Civil Procedure 238 mandates an award of <u>delay damages</u> and is worded in such a way that <u>automatically</u>

requires its imposition in every case:

> Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage.
>
> (a) Except as provided in subsection (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators...shall
>
> (1) Add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a non-jury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision; Pa. R.C.P. 238(a)

The rationale underlying Pennsylvania's Rule 238 Delay Damages differs from that of prejudgment interest in that prejudgment interest is compensatory in nature and is meant to indemnify the claimant for the loss of earnings from the monies presumed due him. See, e.g., Busik v.

Levin, 63 N.J. 351, 358, 307 A.2d 571, ____, app. dism., 414 U.S. 1106 (1973). In contrast, "...the basic aim of [Rule 238] is to alleviate delay in the disposition of cases, thereby lessening congestion in the courts." Laudenberger v. Port Auth. of Allegheny, 496 Pa. 52, 59, 436 A.2d 147, ____, (1981). Indeed, Rule 238 Delay Damages are looked at in terms of "sanctions against the defendant." Laudenberger v. Port Auth. of Allegheny, supra, 496 Pa. at 58. Consistent with the Supreme Court of Pennsylvania, the Third Circuit observes that Rule 238 "was promulgated primarily for the 'procedural' purpose of encouraging settlement and lessening docket congestion..." and has been "designed to expedite the processing of litigation in Pennsylvania." (Emphasis added). Jarvis v. Johnson, 668 F.2d 740, 745 (3d Cir. 1982).

The fundamental difference between Rule 238 Delay Damages and pre-judgment interest statutes in other states is even more evident when it is noted that defendants may be spared the delay damage sanction under limited circumstances, by making a reasonable written settlement offer. Should plaintiff then reject the offer and not recover a verdict 25% greater than the offer, the defendant may be assessed interest only up to the date of the settlement offer:

> (e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made. Rule 238(e).

Pre-judgment interest statutes serve to compensate plaintiffs for an inability to utilize funds and therefore the applicable interest rate is uniformly applied to the jury verdict or award. In commenting on such a pre-judgment interest rule in New Jersey, the Pennsylvania Supreme Court in Laudenberger observed that "[s]uccessful plaintiffs are compensated for delay whether they receive and reject any reasonable settlement offers or not. There is no impetus to the plaintiff to accept an early yet reasonable settlement offer, since the interest continues to run after the offer is made." Laudenberger v. Port Auth. of Allegheny, supra, 496 Pa. at 59.

Based upon the espoused aim and purpose of Rule 238 Delay Damages, the primary objection to the Rule is its mandatory application. Although Rule 238 is clearly punitive by design, the trial judge has been disarmed of discretion to deny, or to

allow only partial delay damages when a balance of equities would provide a fair handed result. Certainly there would be less serious objection, or even no objection at all, to the principle of sanctioning dilatory defendants and encouraging settlements if its application were subject to the discretion of the trial court which has knowledge of the circumstances of pre-trial settlement postures of the parties in the particular case.

Of a more basic consideration, Rule 238 must be deemed unconstitutional because its promulgation by the Supreme Court of Pennsylvania is in excess of that court's constitutional powers. [2] The Pennsylvania Supreme Court's rulemaking authority,

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[2] Rule 238 of the Pennsylvania Rules of Civil Procedure was promulgated by the Supreme Court of Pennsylvania to become effective April 16, 1979. Insurance Federation of Pennsylvania, Inc. v. Supreme Court of Pennsylvania, 669 F.2d 112, 113 (3d Cir. 1982).

under the Pennsylvania Constitution, is limited to the issuance of procedural rules: "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts...if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant...." Pa. Const. Art. 5, §10(c). Thus a very real question exists as to whether the Pennsylvania Supreme Court exceeded its authority when it promulgated a rule, construed by the federal courts to be substantive in nature providing that recovery of a tort judgment shall be attended by allowance of sanctions for delay in the form of interest on the award antecedent to the date of the judgment. Consequently, the propriety of the federal court's regard of the rule as applicable in a non-discretionary manner must be closely scrutinized. If the

Pennsylvania Supreme Court has exercised its procedural rulemaking powers to effect substantive law, it would appear by so doing the court has wrested from the reach of the legislature a matter which is legislative concern. The problem becomes compounded when the federal courts feel constrained to follow, in a blanket fashion, without discretion, a rule that is the result of the circumvention of constitutional limitation. [3]

The case sub judice is illustrative of the problem. Although the equities

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[3] Further proof that the Pennsylvania Supreme Court has exceeded its rulemaking authority is the fact that the court has selected a rate of interest of 10% for purposes of Rule 238. This is yet another infringement upon the exclusive province of the Legislature. Indeed, the Legislature has determined that rates of interest on verdicts and judgments shall not exceed 6%. See, e.g., Act of January 30, 1974, P.L. 13 §§201 and 202, 41 P.S. §§201 and 202 (Supp. 1981); Act of May 28, 1858, P.L. 622, §1, formerly 41 P.S. §3 (1971).

clearly militate against the imposition of any damages for delay against Petitioner, the trial court declined to exercise any discretion and applied the provisions of Rule 238 in a rigid fashion. It cannot be gainsaid that the litigation involved complex and technical engineering issues and that extensive discovery was conducted by all parties. Indeed, the trial court extended discovery and trial schedules on several occasion -more than once at the request of plaintiffs -- to accomodate the sheer magnitude of the litigation. It must also be remembered that the co-defendant of Petitioner engaged in pre-trial preparation and motion practice before ultimately being granted a directed verdict during the first trial. Thus, it cannot seriously be suggested that Petitioner was significantly responsible, any more than plaintiffs or co-defendant, for the time

necessary to prepare for trial. Nor can it seriously be contended that Petitioner is responsible for any "delay" engendered by the lengthy first trial culminating in a hung jury, necessitating a second trial. The result of the first trial is evidentiary of the fact that Petitioner's defenses were an exercise in good faith, rather than dilatory tactic.

Petitioner submits that the trial court should have been unbridled in its discretion to decide whether Petitioner's conduct, either in specific situations or throughout the course of the litigation, was such as to justify any claims by plaintiffs to entitlement to damages for delay under Rule 238. It is further submitted that in considering the question of whether plaintiffs ought to receive delay damages, the trial court should have been free to consider all of the relevant circumstances, including: conduct of

plaintiffs, and co-defendant, as they contributed to delay; and, the fact that Petitioner had every good faith reason to believe it could or would prevail at trial.

Furthermore, Petitioner submits that Rule 238, as applied in the obligatory and rigid manner mandated, contravenes constitutional guarantees. [4] For example,

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[4] The same judicial body that promulgated Rule 238 -- the Supreme Court of Pennsylvania -- has later ruled upon the propriety of its own actions. Not surprisingly, the Supreme Court of Pennsylvania has found its actions constitutional. Laudenberger v. Port Auth. of Allegheny, 496 Pa. 52, 436 A.2d 147 (1981); Insurance Federation of Pennsylvania, Inc. v. Supreme Court of Pennsylvania, 669 F.2d 112 (3d Cir. 1982). Further, Rule 238 has been found applicable in diversity actions in federal court. Jarvis v. Johnson, 668 F.2d 740 (3d Cir. 1982). It must be noted that the courts have assumed, in a conclusory manner, that Rule 238 is a pre-judgment interest rule. Indeed, ignoring the distinction between the purposes of Rule 238 Delay Damages and standard pre-judgment interest statutes, the Third Circuit in Ins. Federation of Pa. v. Supreme Court of Pa., supra, relied upon the reasoning set forth in the New Jersey Supreme Court decision of Busic v. Levin, supra, that specifically addressed New Jersey pre-judgment interest Rule 4:42-11(b).

the concept of equal protection demands uniform treatment to be given to similarly situated parties. See, e.g., Reed v. Reed, 404 U.S. 71, 76 (1971), quoting Royston Guano Co. v. Virginia, 353 U.S. 412, 415 (1920). Yet, Rule 238 increases the award available to a plaintiff by mandating the deprivation of a defendant's property without consideration of the equities. Thus, plaintiff's rights have been enlarged, while the rights of the defendant have been abridged so that plaintiffs and defendants are unequally treated. Further, under Rule 238, diligent defendants are treated as dilitory defendants without so much as an inquiry into the conduct or motivations of the parties. Also, conceding that Rule 238, was promulgated for the purpose of relieving congested court dockets, is an attempt to achieve a laudable end, the

Rule bears no relation to this purpose because the deprivation of the trial court's discretion eliminates the only opportunity the court system possesses to determine whether delay in fact occurred and who was responsible for it. Indeed, Rule 238, as presently applied, improperly establishes the irrebuttable presumption that all defendants, in every case, are responsible for failures of litigants to arrive at pre-trial settlements.

As with equal protection, the touchstone of due process is whether the law in question is rationally related to a legitimate state goal, or whether the state action arbitrarily works to deny an individual of life, liberty, or property. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Rogin v. Bensalem, 616 F.2d 680 (3d Cir. 1980). As applied, Rule 238 deprives defendant of its pro-

perty in the complete absence of notice and opportunity to be heard, a procedure violative of due process required by the Fourteenth Amendment. The due process clause prohibits the state from acting in an arbitrary or capricious manner. Slochower v. Bd. of Higher Education, 350 U.S. 551, 559 (1959). see, also, Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980) (by implication); Sniadach v. Family Finance Corp. of Bayview, 395 U.S. 337 (1969); Nelson v. SEPTA, 420 F.Supp. 1374 (E.D.Pa. 1976). Thus, Petitioner submits that the automatic award of Rule 238 Delay Damages contravenes constitutional guarantees and, as applied, must give way to the strong countervailing federal interest of due process and equal protection of the laws. Accordingly, the district court must be free to conduct an independent inquiry as to

whether the circumstances warrant the imposition of damages for delay.

II.

Petitioner was denied a fair and impartial trial under the cumulative circumstances where the trial court, without any explanation whatsoever on the record, turned full circle and ordered a non-bifurcated re-trial. The re-trial included the automatic introduction of inflammatory photographs in the complete absence of an independent balancing of probative value versus possible prejudice, At the same time, the trial court refused to reinstate Petitioner's co-defendant who had been granted a directed verdict during the first trial in disregard of the existence of evidence clearly supporting Petitioner's theory of recovery as against that co-defendant. Accordingly, Petitioner has been denied due process under

the law as well as being denied its right to a jury trial as against co-defendant.

Federal policy has historically favored trial by jury. The Seventh Amendment to the Constitution of the United States has preserved the right to trial by jury as it existed at common law. 5 J. Moore, Moore's Federal Practice ¶38.08[5] (2d ed. 1982). The federal system has jealously guarded the "essential characteristic" of common law actions, which "under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 537 (1958). And, as concerns partial new trials, the Supreme Court has cautioned that the power to grant a partial new trial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the other that

a trial of it alone may be had without injustice." Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931).

In the case sub judice, plaintiffs were afforded a trial de novo as to Petitioner. However, Petitioner was afforded no such similar right as to co-defendant even though the first trial that produced the directed verdict in favor of co-defendant was essentially a nullity. Petitioner submits that the trial court was under an obligation to restore the status quo ante so that all parties would be afforded their constitutionally mandated right to trial by jury. However, in addition to denying Petitioner the opportunity to present evidence and witnesses to the decision-maker on the subject of Petitioner's claims against co-defendant, the trial court's refusal to reinstate co-defendant as a party at the second

trial deprived the jury of the opportunity to view the accident comprehensively. The absence of co-defendant, a primary actor, from the case permitted the jury only a monocular view of the accident and so the jury was given an all or nothing choice as to the lone defendant. [5]

Notwithstanding the fact that the first trial of this cause was conducted in a bifurcated setting, the trial court ruled against Petitioner and ordered the re-trial to be conducted in a non-bifurcated proceeding. However, the trial court failed to support its decision not to bifurcate with an explication on the record demonstrating an exercise of an

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[5] Petitioner submits that the trial court erroneously granted a directed verdict in favor of co-defendant during the first trial in complete disregard of the existence of evidence clearly supporting Petitioner's theory of recovery as against co-defendant.

informed discretion under the facts. [6]

Petitioner has been denied due process in that its ability to obtain a fair and impartial trial was severely impaired by the trial court's decision to turn full circle and order a non-bifurcated re-trial that permitted the introduction of gruesome photographs and, in addition, was conducted in the absence of Petitioner's co-defendant. The Supreme Court has continually held that "a fair trial and a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1965). The absence of a

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[6] The trial court's refusal to bifurcate the second trial automatically included the court's ruling that inflammatory color photographs of injuries suffered by one of the workmen would be admitted into evidence and shown to the jury. From the second trial record, it is absolutely clear that the court did not engage in a new, independent determination of whether or not those photographs' probative value outweighed the danger of unfair prejudice.

recorded explanation to this disturbing lack of consistency and predictability to the results of the trial court's discretionary decisions on the same issue plainly brings into question due process considerations. The Third Circuit has held that the exercise of informed discretion on the record is required when the trial court addresses the subject of whether to bifurcate vel non. Lis v. Robert Packer Hospital, 579 F.2d 819 (3d Cir. 1978), cert. denied, 439 U.S. 955 (1978); Franklin Music Company v. American Broadcasting Companies, Inc., 616 F.2d 528 (3d Cir. 1979).

III.

The Pennsylvania Workmen's Compensation Act, §303, Pa. Stat. Ann. Tit. 77 §431 (Purdon Cumm. Supp. 1981-1982) is in direct conflict with the Federal Rule of Civil Procedure, Rule 19(a). Petitioner

sought the joinder of plaintiff's and plaintiffs' decedent's employer, HMI, as an involuntary plaintiff, pursuant to F.R.C.P. Rule 19(a). Joinder was desired for the purpose of allowing the trier of fact to consider and determine the degree of causal negligence attributable to HMI pursuant to the Pennsylvania Comparative Negligence Act, 42 Pa. C.S.A. §7102 (Purdon Supp. 1981). The trial court refused Petitioner's request to present a Special Interrogatory to the jury wherein HMI's causal negligence could be entered. The trial court's refusal was based upon the holding in Heckendorn v. Consolidated Rail Corporation, 293 Pa. Super. 474, 439 A.2d 674 (1981), aff'd. No. 28 E.D. Appeal Dkt. 1982, that interpreted the Pennsylvania Workmen's Compensation Act to preclude an employer from being joined as a party to a litigation for any purpose.

Where there is a direct conflict between state law and a Federal Rule of Civil Procedure, the case is controlled by the Rules Enabling Act, 28 U.S.C. §2072 (1976):

> The Supreme Court shall have the power to prescribe by general rules, the form of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. ...
>
> Such rules shall not abridge, enlarge or modify any substantive right....
>
> * * *
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect....

Accordingly, Petitioner submits that pursuant to the Rules Enabling Act, and under Hanna v. Plumer, 380 U.S. 460 (1965), the Federal Rule must be applied and joinder

of the employer permitted. Petitioners submit that to permit joinder of the employer pursuant to F.R.C.P. Rule 19(a) as an involuntary plaintiff would not create any problem of form shopping or result in an inequitable administration of the law. This is so because joinder would not have exposed HMI to liability beyond payments under the Pennsylvania Workmen's Compensation Act, since that Act, by its terms, excludes employer liability to third parties for damages, contribution or indemnity. As presently applied, the Pennsylvania Workmen's Compensation Act, as interpreted by Heckendorn, supra, abrogates the Federal Rules of Civil Procedure on the subject of joinder of persons needed for a just adjudication. Accordingly, Petitioner was denied a fair trial, as due process requires, on the subject of the culpability of all parties arguably responsible for the accident.

CONCLUSION

The application of Pennsylvania Rule of Civil Procedure Rule 238 to a judgment without consideration of the equities of the parties' conduct has deprived Petitioner of its guaranteed rights and protections under the equal protection and due process clauses of the United States Constitution through the taking of Petitioner's property.

Petitioner's property rights have been equally prejudiced by the denial of a fair jury trial on co-defendant's culpability as a result of the trial court's denial of reinstatement of co-defendant as a party in the non-bifurcated re-trial. The denial of Petitioner's request for adjudication of the fault of the employer of

plaintiff and plaintiffs' decedents precluded a just adjudication.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA L. HEFFELFINGER, Administratrix of the Estate of George R. Heffelfinger, Deceased, and LINDA L. HEFFELFINGER in her own right	:	C.A.No. 79-1140
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
EMMA F. STAHLER, Administratrix of the Estate of Leonard R. Stahler, Deceased, and EMMA F. STAHLER, in her own right	:	C.A.No. 79-1141
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
HARRY SCOTT FETTERMAN	:	
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	C.A.No. 79-3769

MEMORANDUM

CAHN, J. , 1982

Before the court in this engineering

malpractice case are the motions of defendant Stone & Webster Engineering Corporation ("Stone & Webster") for judgment notwithstanding the verdict or, in the alternative, for a new trial. Also before the court are plaintiffs' motions to add interest to the verdicts as provided for by Pa. R. Civ. P. 238. For the reasons set forth below, defendant's motions will be denied and plaintiffs' motions will be granted.

I. PROCEDURAL BACKGROUND

On August 18, 1978, an explosion and fire erupted in a factory building owned and operated by Hart Metals, Inc. ("Hart") in Tamaqua, Pennsylvania. The factory produced powdered magnesium, an extremely hazardous substance, for use in military incendiary devices. Three Hart employees were severely burned in the explosion and fire. Two, George R. Heffelfinger and

Leonard R. Stahler, Sr. died as a result of their burn injuries or complications arising therefrom. They are represented in this matter by their widows who in each instance have obtained letters of administration. The third plaintiff, Harry Scott Fetterman, survived the explosion and fire although he suffered serious burn injuries resulting in permanent disfiguration and permanent loss of motion and dexterity.

The administratrices and later Fetterman each brought separate law suits in this court against Stone & Webster, a firm of professional engineers, alleging negligence in the design of the Hart factory. Fetterman's suit also named Shick Tube-Veyor Corporation ("Schick") as a defendant. He alleged that Shick was liable to him under the concept of products liability as set forth in Restatement (Second)

of Torts §402A (1965). The administratrices then amended their complaints to include Shick as a party defendant. Stone & Webster filed a cross claim against Shick seeking contribution or indemnity on theories of negligence and products liability. The three cases were consolidated for trial.

These cases were tried twice. In the first trial, which took place in February and March 1981, the jury was unable to reach a decision, and after four days of deliberation the jury was dismissed. The second trial was held in June and July 1981. The jury answered special interrogatories holding Stone & Webster liable to each plaintiff. [1] The verdicts were molded to reflect the finding of ten

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[1] The special interrogatories and the jury's answers thereto are attached hereto as Appendix "A".

percent contributory negligence on the part of Fetterman and the two decedents. Accordingly, the award to Heffelfinger's administratrix was $360,000, the award to Stahler's administratrix was $103,500, and the award to Fetterman was $270,000. Plaintiffs seek to enhance their verdicts by application of Pa. R. Civ. P. 238.

Prior to the first trial, plaintiffs gave joint tortfeasor releases to Shick in consideration of the receipt of $75,000 which was allocated one-third to each plaintiff. At the first trial plaintiffs introduced no evidence against Shick, and therefore a directed verdict pursuant to Fed. R. Civ. P. 50(a) was granted in favor of Shick as to plaintiffs' claims against it. At the conclusion of Stone & Webster's case for contribution or indemnity against Shick, Shick's motion for a directed verdict was granted.

II. FACTUAL BACKGROUND

In 1966 Hart engaged Stone & Webster to design a plant for the production of magnesium powder to be used in incendiary devices for the Vietnam War. Stone & Webster participated in the selection of the site for the Hart factory, designed the process by which magnesium powder would be made from magnesium ingots, played an instrumental role in obtaining approval of the Department of Labor and Industry of the Commonwealth of Pennsylvania for a facility handling hazardous material, coordinated and supervised the remodeling of the Arlington Round House (an abandoned railroad locomotive facility formerly owned by the Central Railroad of New Jersey), and rendered advice to Hart about the operation of the facility during and after the completion of the remodeling work.

Plaintiffs presented a number of expert

witnesses including John Nagy, formerly employed by the United States Bureau of Mines where he specialized in problems associated with dust explosions, and Dr. Alan Foust, formerly Chairman of the Department of Chemical Engineering at Lehigh University. These experts opined that Stone & Webster acted negligently in regard to their undertakings connected with the Hart facility. While Stone & Webster controverted these opinions, the jury found Stone & Webster to have been negligent and that its negligence was a substantial factor in causing the losses suffered by the plaintiffs.

Although Stone & Webster raised twenty-six reasons in support of its post-trial motions, I will discuss only those reasons which have been briefed and argued.

III. IN THE FIRST TRIAL STONE & WEBSTER FAILED TO INTRODUCE SUFFICIENT EVIDENCE AGAINST SHICK TO WARRANT SUBMISSION TO THE JURY OF ITS CLAIM FOR CONTRIBUTION OR INDEMNITY BASED UPON EITHER A PRODUCTS LIABILITY THEORY OR A NEGLIGENCE THEORY

Shick was dismissed as a defendant at the first trial because plaintiffs presented no evidence against it. Shick was also dismissed as the defendant on Stone & Webster's cross-claim at the first trial, because the evidence Stone & Webster presented against Shick was insufficient to warrant submission of products liability or negligence claims to the jury.

In order to assess Stone & Webster's contentions, additional factual background is necessary. The process designed by Stone & Webster involved the atomization of magnesium followed by the separation of the powder into holding bins each containing powder of a different degree of fineness. The bottom of these holding bins

was about six feet above the ground level of the building. Workmen would collect the powder in a movable buggy by allowing the powder to drop by gravity from the holding bins into the buggy. The buggy contained a scale to enable workmen to weigh out powder of a certain fineness from the various holding bins in order to meet military and other specifications. The buggy would then be rolled to a batch hopper which was in a pit below the level of the ground floor. This pit had previously been used to service locomotives. The workmen would drop the magnesium powder from the buggy into the batch hopper. The powder was then conveyed pneumatically from the batch hopper for further processing. Shick was the manufacturer of the batch hopper and the pneumatic conveying equipment.

The batch hopper required periodic

repair. The workmen were reluctant to work within the confines of the pit fearing that in the event of a fire they would be unable to escape. Consequently, in 1978 the workmen obtained permission from Hart to remove the batch hopper from the pit when it was necessary to make repairs to that piece of equipment. The fire and explosion occurred from frictional sparks generated when the batch hopper fell as the two decedents and Fetterman were lowering it back into the pit after making a repair.

It is the contention of Stone & Webster that Shick knew or should have known that repairs to the batch hopper would periodically be required and that Shick knew the batch hopper was to be placed in a pit. Thus, argues Stone & Webster, it is a jury issue as to whether Shick was negligent or liable under §402A for failing to warn

Hart and/or Stone & Webster that the batch hopper (which Shick knew would be used to collect magnesium powder) should not be placed in a confined area. In this fact situation there is as a matter of law no negligence nor any liability under §402A. It should be kep in mind that there was no evidence the batch hopper malfunctioned. Nor was there any evidence of a design defect in the batch hopper. Stone & Webster's entire case against Shick, therefore, is predicated on Shick's failure to warn against placing the batch hopper in the pit.

Whether or not a product is unreasonably dangerous is in the first instance a decision to be made by the court. Azzarello v. Black Bros. Co., Inc., 480 Pa. 547 (1978). As stated by the Supreme Court of Pennsylvania in Azzarello, p. 558:

> Thus the mere fact that we have approved Section 402A, and even

if we agree that the phrase 'unreasonably dangerous' serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration. Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? these are questions of law and their resolution depends upon social policy. Restated, the phrases 'defective condition' and 'unreasonably dangerous' as used in the Restatement formulation are terms of art invoked when strict liability is appropriate. It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution.

In my view, the product supplied by Shick was not unreasonably dangerous for failure to accompany it with warnings to Hart and/or Stone & Webster. Tested by either Azzarello, id., [2] or by the stricter standard applicable to a Fed. R. Civ. P. 50(a) motion, [3] Stone & Webster failed to present evidence to substantiate its claim

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[2] The holding in Azzarello v. Black Bros. Co., Inc., 480 Pa. 547 (1978), has been cast in some doubt, as it applies to federal diversity cases, by dictum in Hollinger v. Wagner Mining Co., No. 81-1359, slip op. at 16 (3d Cir. Dec. 22, 1981). In footnote 11 of Hollinger, the court cites precedent contrary to Bailey v Atlas Powder Co., 602 F.2d 585 (3d Cir. 1979), and Baker v. Outboard Marine Co., 595 F.2d 1976 (3d Cir. 1979), two cases which had been cited by the lower court in Hollinger, which commented on the Azzarello approach.

[3] As stated in Dougherty v. Hooker Chemical Corp., 540 F.2d 174, 178 (3d Cir. 1976):

> [I]t would be error to grant a directed verdict for the defendant if there is evidence reasonably tending to support the recovery of plaintiff as to any of its theories of liability.

that the product supplied by Shick was in any way defective or unreasonably dangerous because of any failure by Shick to accompany its product with warnings against placing the batch hopper in the pit.

As a matter of negligence law, a supplier of a chattel has no duty to warn a professional consulting engineering firm or that firm's customer that periodic repairs to industrial machinery are required. It is a matter of common knowledge that maintenance and repairs must be made to such machinery. The decision to place the batch hopper in a pit was made by Stone & Webster. Stone & Webster urges that if it can be held negligent for failing to anticipate that placing the batch hopper in a pit could unreasonably expose workmen to dangers of an explosion, then Shick should be held to the same standard. The problem with that analysis is that

Stone & Webster and not Shick was the designer of the plant and that Stone & Webster and not Shick made the decision to place the batch hopper in a pit. Shick was informed [4] that the magnesium powder to be processed through the batch hopper was not unusually dangerous, and I conclude that as a matter of negligence law Shick had no responsibility under these

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[4] In defendant's exhibit no. 130 introduced in the first trial (a transcript of which has not been prepared), an employee of Shick, Bill Ungashick, was informed in writing by a Mr. Green, a manufacturer's representative, that the magnesium material was a "zero hazard ... as it is possible to put out a cigarette directly into the material." While this evidence by itself may not be conclusive of the fact of product safety (the employment status and qualifications of Green are not clear as a matter of law), it certainly is evidence of the fact that Shick was informed of the product's safety. There was no evidence to the contrary brought forth by Stone & Webster, which had the burden of proof. It is noteworthy that Mr. Hart of Hart Metals, Inc. illustrated the safety of magnesium powder by placing a lighted cigarette into the powder in the presence of Stone & Webster engineers.

circumstances to provide any warnings. See Orion Ins. Co., Ltd. v. United Technologies Corp., 502 F.Supp. 173 (E.D. Pa. 1980). In our case it is not the product but the use to which Hart put the product that is of consequence. As stated in Orion, id., p. 178:

> Just as in the safety devices cases, where the Third Circuit has said that the district court may consider, inter alia, the expertise of the component part manufacturer vis-a-vis the assembler of the finished product, I believe a similar inquiry is in order when considering whether the component part manufacturer can be held liable for failure to warn the user. When that standard is applied here, it is clear that Amtel did not have the expertise requried to know enough to give a warning.

It should be emphasized that there was no evidence the batch hopper itself wsa defective. Shick therefore is in the position of a component part supplier and should not be held strictly liable or

negligent for failure to warn about danger from a condition which was designed by Stone & Webster. See Taylor v. Paul O. Abbe, Inc., 516 F.2d 145 (3d Cir. 1975); Verge v. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978).

Stone & Webster also did not prove that the failure to provide any warnings on the part of Shick was a substantial factor in causing the accident. There was no testimony that Stone & Webster relied on Shick in regard to the decision to place the batch hopper in the pit. Nor was there any evidence that if warnings were given by Shick, Stone & Webster would have changed its decision to place the batch hopper in the pit. See Greiner v. Volkswagenwerk Atktiengesellschaft, 429 F.Supp. 495 (E.D. Pa. 1977). I conclude, as did Chief Lord in Greiner, that the causal connection between any failure on the part of Shick to provide a warning and the

injuries to the plaintiffs is too remote to raise a jury issue.

Finally, Stone & Webster did not order the transcript of the portions of the first trial dealing with its third-party claims. It should have done so in accordance with Local Rule of Civil Procedure 20(e). [5] I do not dismiss Stone & Webster's contention on this basis but call attention to the fact that I was required to rely on my memory and trial notes in reviewing the evidence presented.

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[5] Local Rule of Civil Procedure 20(e) states:

> Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the official court reporter, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion may be dismissed for lack of prosecution.

IV. IT WAS NOT ERROR TO ADMIT INTO EVIDENCE A PHOTOGRAPH OF MR. HEFFELFINGER TAKEN AFTER THE EXPLOSION AND FIRE BUT BEFORE HIS DEATH

Stone & Webster contends that reversible error was committed in the admission into evidence of a color photograph of Mr. Heffelfinger depicting the charred condition of his body. Stone & Webster does not dispute the relevancy or authenticity of the photograph. It contends, however, that prejudice from the introduction of the photograph sufficiently outweighs any probative value to the extent that a new trial is required. As a corollary to this argument, Stone & Webster also urges that it was reversible error not to bifurcate these proceedings. If the trial were bifurcated the possibility would be eliminated that the jury would be motivated to find liability because of the gruesome aspects of a picture whose relevancy was limited to damages.

The Court of Appeals for the Third Circuit has held that bifurcation is to be the exception and not the rule. The first proceeding was bifurcated but medical testimony was required in the liability phase of the case because the burn patterns on the plaintiffs' bodies were relevant to their theory of liability. The medical and economic testimony was not anticipated to take much time. Consequently, in the second trial I decided not to bifurcate and I believe that my decision is fully supported by Judge Aldisert's opinion in Lis v. Robert Packer Hospital, 579 F.2d 819 (3d Cir.), cert. denied, 439 U.S. 955 (1978). [6] Once the

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[6] As Judge Aldisert stated:

> Although it is reported that some district courts have adopted local rules that encourage separation of liability from damages, See Writ and Miller, Federal Practice and Procedure, §2390, the rule in this

decision was made not to bifurcate this trial, the introduction of the photographs was clearly relevant to plaintiffs' contention that Mr. Heffelfinger had seen himself in a mirror prior to his death and was suffering mental anguish to such an extent that he did not want his children to see him before he died.

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circuit since 1972 has been that the decision to bifurcate vel non is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance. Idzojtic v. Pennsylvania Railroad Co., 456 F.2d 1228, 1230 (3d Cir. 1971) ('The district court is given broad discretion in reaching its decision whether to separate the issues of liability and damages. 9 Wright & Miller, Federal Practice and Procedure §2393.')

We are advised that where district courts have adopted a general bifurcation rule, a heated controversy among the commentators and the profession has resulted. Those who favor the trial of liability separate from damages in personal injury actions emphasize the time

It is in this context that Stone & Webster contends the admission of the picture was error because its probative value was outweighed by prejudice. The damage issues were not the issues that were predominantly litigated in this proceeding. Most of the trial was related to liability issues. Plaintiffs' attorney did not try the case on an emotional level and did not use the photograph in question in his closing argument. Plaintiffs' attorney did not attempt to inflame the jury against defendant on the basis of the

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savings, and also suggest that in theory there should be no difference in the eventual outcome of the case. But an equally impressive argument is advanced that in many cases, especially personal injury negligence cases, the separation might affect the outcome of the case. Although cognizant of these competing considerations, this court has heretofore cast its lot with the views expressed by the Advisory Committee that bifurcation 'be

horrible death suffered by Mr. Heffelfinger. In short, plaintiffs did not take prejudicial advantage of the photograph, which was clearly relevant. Therefore, in retrospect it was a proper decision to allow the photograph to be shown to the jury by Dr. Okunski and to be sent to the jury room along with hundreds of other

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encouraged where experience has demonstrated its worth', but that 'separation of issues for trial is not to be routinely ordered'. We adhere to that position. Thus a routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters.

Accordingly, notwithstanding the sincere and conscientious efforts of this distinguished trial judge to institute a set procedure for all cases, we disapprove of a general practice of bifurcating all negligence cases. Because our previous decision in Idzojtic, supra, was a per curiam opinion and contains a passage that diluted the clarity of our holding, we wish to reemphasize our view. A general policy of a

exhibits. Finally, the jury's award to each of the plaintiffs was well within the dollar losses proved by plaintiffs and in no way represented an unconscionable verdict.

Stone & Webster suggests that I abused my discretion in allowing the photograph because I did not understand that the appropriate test is to balance the probative value against the possible prejudical effects. [7] This I have done. At side bar

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district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case. 579 F.2d at 824 (footnotes omitted).

[7] Fed. R. Civ. P. 403 states:

Although relevant, evidence may be exluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

before ruling on the admissibility of the photograph, during the colloquy, I observed that:

> MR. POWELL: All right, may I state my objection on the record at this point?
>
> THE COURT: Yes, you may.

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cumulative evidence.

The advisory committee notes on the proposed rules explained this procedure more fully as follows:

> The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.

> MR. POWELL: My objection is, sir, that the photographs which you refer to, which are proposed to be offered into evidence, offer virtually no probative additional value than other documentation or the testimony of the doctor as I understand it will be, and is much more calcuably to incite or inflame the jury than it is to assist the jury. And that's the basis of my objection to its admission, sir.

The effect of Rule 403 is discussed at length in United States v. Long, 574 F.2d 761 (3d Cir.), cert. denied, 439 U.S. 985 (1978). There the court stated, p. 767, inter alia:

> In view of the revision made by Congress, and the use of 'may' in the final version of Rule 403, it is manifest that the draftsmen intended that the trial judge be given a very substantial discretion in 'balancing' probative value on the one hand and 'unfair prejudice' on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative

THE COURT: My task as trial judge is to weigh the probative value of the evidnece against possible prejudice.

I believe that there are claims here for considerable pain and suffering for all three plaintiffs. We have already shown the burn picture of Mr. Fetterman to the jury, and I preceive [sic "perceived"] no prejudice from their viewing those pictures. I was watching them as those pictures came in. I believe that in ligfht of the length of time which the decedents survived, that pictures are highly probative of the suffering of the decedents. And that while that's prejudicial to the defendant, all evidence that

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value, or (b) the prejudice presented by the evidence. This inference is strengthened by the fact that the Rule does not establish a mere imbalance as the standard, but rather requires that evidence 'may' be barred only if its probative value is 'substantially outweighed' by prejudice. The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused by a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom.

> is adverse to the defendant is prejudicial. And I find that the probative value of the pictures outweighs any unfair reaction the jury might have, and I doubt if they will.

Record at 2014, 2015. That observation does not taint the evidentiary ruling because in the context of this litigation the introduction of the photograph did not result in undue prejudice to the defendant compared to the legitimate evidentiary value to the plaintiff.

V. THE INSTRUCTIONS TO THE JURY ON THE ISSUE OF SUPERSEDING CAUSE WERE PROPER

At the request of Stone & Webster, an interrogatory to the jury was submitted on the question of superseding cause. I based my charge to the jury on this phase of the case on sections 440, 442, 443, 447 and 452 of the Restatement (Second) of Torts (1965). No specific exceptions to such charge were taken by Stone & Webster

other than to my refusal to affirm said defendant's proposed points number 24 and 30.

Defendant alleges it was error of a sufficient magnitude to require a new trial not to affirm defendant's proposed instruction number 24 and defendant's proposed instruction number 30. These proposed points of instruction read as follows:

> 24. A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a factor in bringing about. Restatement (Second) of Torts, §441. Klages v. General Ordinance Equipment Corp., 240 Pa. Superior Court 356, 367 A.2d 304 (1976).
>
> 30. You are charged that the conduct of Hart Metals, Inc., acting independently and by and through its employees, including plaintiffs, and their decedents, constituted negligence and was the superseding, intervening cause of the accident if the

practical means of protecting workmen, including plaintiffs and/or their decedents, in the plant was capable of implementation by Hart Metals without advice, knowledge or assistance from Stone & Webster or if you believe there was a long interval of time between the design of the plant by Stone & Webster and the accident during which time Hart Metals was in sole possession and control of the equipment in the plant and in line with its obligations as an employer could justifiably be expected to take those steps necessary for the safety of its employees. Meuller v. Jeffrey Manufacturing Co., supra; W. Prosser, Handbook on the Law of Torts, 273 (4th ed. 1971).

With respect to the points of law reflected in the two proposed instructions, those matters were covered in my charge to the jury. In addition, the request for instruction number 30 contains detailed factual material that amounts almost to a request for a directed verdict.

VI. IT WAS PROPER TO PRECLUDE THE JURY FROM DETERMINING WHETHER OR NOT HART WAS ALSO LIABLE TO PLAINTIFFS

Stone & Webster attempted to inject Hart's liability into these proceedings in two ways. First, after the initial trial Stone & Webster moved for the joinder of Hart pursuant to Fed. R. Civ. P. 19. This motion was denied. At the second trial, Stone & Webster sought to have the negligence of Hart assessed in comparison with the negligence of plaintiffs and Stone & Webster. This request was also denied. There is considerable controversy about whether, in a suit by an employee against a third-party tortfeasor, the employer may be joined for the purpose of apportioning negligence under Section 303 of the Pennsylvania Workmen's Compensation Act, Pa. Stat. Ann. tit. 77, §481 (Purdon). There is authority on both sides of this issue. This authority is set forth in detail in Heckendorn v. Consolidated Rail

Corporation, No. 2177 Philadelphia, 1980 (Pa. Super. Ct. Oct. 9, 1981). The Heckendorn case is the most recent appellate pronouncement from the courts of the Commonwealth on this issue. I elect to follow it. In Heckendorn, Judge Wieand held that joinder was barred, and I adopt the reasoning set forth in his lucid and thorough opinion.

VII. THERE WAS NO ERROR IN THE INTRODUCTION OF EXPERT TESTIMONY

A.

Stone & Webster contends that it was error to allow plaintiffs' expert to base opinions on the existence of magnesium dust accumulation prior to the accident when there was no evidence of that fact in the record. A review of the record, however, reveals that defendant is in error in the factual basis for this contention. The record clearly shows at p.

530-531 as follows, quoting from plaintiffs' witness David Bower's testimony:

> Q. Yes. When you were working in that room and the product was being produced by the spinning disc method and after cleanup would be done by your shift people, do you recall what the room looked like?
>
> A. Yes, it was pretty clean.
>
> Q. Can you compare the level of cleanliness between back then when it was powdered by the spinning disc method and what the room looked like, let's say, the morning of the accident?
>
> A. It might have been a little dustier when we changed over to the spray system. That causes more dirt. We couldn't get it all cleaned up.
>
> Q. What about after the second shift had done its cleanup?
>
> A. It was pretty well cleaned up.
>
> MR. POWELL: Objection.
>
> MR. FELDMAN: What's the objection?
>
> MR. POWELL: When?

THE COURT: Yes, when are you talking about, counsel?

Q. The morning of the accident after the second shift had done its cleanup?

A. Oh, it was clean.

Q. After the second shift did its cleanup, was there any dust or any accumulations on any of the beams overhead?

MR. POWELL: Objection unless he states he looked.

THE COURT: You may only answer if you know, Mr. Bower, if you remember.

A. Oh, I know there was some on the beams. You couldn't get it off.

Q. Why is that?

A. It was just too hard to clean up. You just couldn't do it. It would take you so long to do it you couldn't produce nothing.

Q. You couldn't --

A. It would take too long to do, you couldn't produce no powder, no product.

Therefore, there was a sufficient factual

predicate to allow plaintiffs' expert to assume that magnesium dust had accumulated on overhead beams and ledges on the day of the explosion.

B.

Stone & Webster contends that it was error to permit plaintiffs' explosion experts and one of defendant's explosion experts (on cross-examination) to base opinions about the explosion and fire on medical evidence of the burn patterns on the victims' bodies. Plaintiffs at both trials elected to proceed on a theory that there was an initial explosion and fire when the batch hopper was dropped into the pit which was followed by additional explosions caused by the accumulation of dust throughout the plant. Plaintiffs contended that the design of the plant violated applicable safety codes by failing to provide for the separation by walls of different plant operations and by

the failure to design the overhead beams and ledges to reduce the collection of dust.

To support its successive explosion theory plaintiffs' counsel asked the experts whether they had an opinion about this theory and if in reaching that opinion wehther or not they considered the burn patterns on the victims' bodies. Two of the victims who were near the pit at the time of the first explosion, Stahler and Fetterman, were not burned on the front part of their bodies but were severely burned on the rear portions of their bodies. This was significant because both of them were facing the pit at the time of the first explosion. Heffelfinger, who was burned on ninety percent of his body, was in a different position than Fetterman and Stahler. No medical expertise was required on the part

of these explosion experts to use in the substantiation of their conclusions the burn patterns on the bodies of the victims which had been identified by a medical witness, Dr. Okunski. Consequently, there was no error.

VIII. INTEREST SHOULD BE ADDED TO THE VERDICTS IN ACCORDANCE WITH PENNSYLVANIA SUPREME COURT RULE 238

The Supreme Court of Pennsylvania pursuant to its constitutional rule making authority promulgated Pa. R. Civ. P. 238 which awards damages for delay in an action for bodily injury, death or property damages. [8] The rule "must be

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[8] Pa. R. Civ. P. provides in part:

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the vourt or the arbitrators appointed under the Arbitration Act of June 16, 1936, P.L. 715, as amended, 5 P.S. §30 et seq., or the Health Care Services Malpractice Act

applied by the federal courts sitting in Pennsylvania." Jarvis v. Johnson, No. 80-1951, slip op. at 3 (3d Cir. January 11, 1982).

It is undisputed that the only written offer received by plaintiffs was on February 25, 1981, prior to the start of the first trial, in an amount of $200,000 as

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of October 15, 1975, P.L. 390, 40 P.S. §1301.101 et seq., shall

> (1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded , which shall become part of the award, verdict or decision;
>
> (2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.
>
> ...
>
> (footnote continued)

total settlement for all three plaintiffs, without any breakdown as to such plaintiffs.

It is also undisputed that the only other offers were oral offers. One was made to plaintiff Linda L. Heffelfinger during jury deliberations of the first trial in the amount of $250,000. This was not part of the record of the trial nor was it in writing. During the second trial (not prior to the trial as required by the rule) the counsel for defendant Stone & Webster made an oral offer to counsel for plaintiffs to settle all

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(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made. (footnote continued)

three cases for a total amount of $600,000, without any further breakdown. This oral offer was placed on the record, but was not in writing. It is quite clear from the words of the statute that these offers did not meet the criteria to excuse Stone & Webster from being subject to the payment of the interest as required by Rule 238. Section (a) of said rule requires a written offer to be made prior to trial in a specified sum. In this case there was a failure to meet the terms of

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(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effectrive date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

....

Adopted Nov. 20, 1978, effective 120 days after Dec. 16, 1978. [Effective date therefore is April 15, 1979.]

the rule's requirements. The total amounts received by each plaintiff after reduction for a ten percent contributory negligence charge calculated as follows:

Heffelfinger	--	$360,000
Stahler	--	103,500
Fetterman	--	270,000

Quite clearly the only written offer of February 25, 1981, was exceeded by more than 125 percent in the recovery awarded by the jury in the second trial.

I will amend the verdict of the jury to include delay damages, pursuant to Pa. R. Civ. P. 238 in the amount of ten percent each, and beginning on the dates stated as follows:

(a) Heffelfinger, from October 15, 1979 (six months after effective date of rule).

(b) Stahler, from October 15, 1979 (six months after effective date of rule).

(c) Fetterman, from October 18, 1979 (date plaintiff filed initial complaint).

IX. CONCLUSION

For the foregoing reasons, the motion of defendant Stone & Webster Engineering Corporation for judgment notwithstanding the verdict or, in the alternative, for a new trial will be denied. In addition, ten percent per annum delay damages will be added to the verdicts rendered by the jury as follows:

(a) Heffelfinger ($360,000) from October 15, 1979, to the date of verdict, July 22, 1981;

(b) Stahler ($103,500) from October 15, 1979, to the date of verdict, July 22, 1981;

(c) Fetterman ($270,000) from October 18, 1979, to the date of verdict, July 22, 1981.

Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA L. HEFFELFINGER, Administratrix of the Estate of George R. Heffelfinger, Deceased, and LINDA L. HEFFELFINGER in her own right	:	C.A.No. 79-1140
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
EMMA F. STAHLER, Administratrix of the Estate of Leonard R. Stahler, Deceased, and EMMA F. STAHLER, in her own right	:	C.A.No. 79-1141
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
HARRY SCOTT FETTERMAN	:	
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	C.A.No. 79-3769

INTERROGATORIES TO THE JURY

1. Have the plaintiffs proved by a preponderance of the evidence that defen-

dant, Stone & Webster Engineering Corporation was negligent?

ANSWER: YES__X__ NO____

If your answer is NO, return to the courtroom. If your answer is YES, proceed to answer question 2.

2.(a) Has the plaintiff, Linda L. Heffelfinger, Administratrix of the Estate of George R. Heffelfinger, proved by a preponderance of the evidence that the negligence of Stone & Webster Engineering Corporation (which you found to exist by your "YES" answer to question 1) was a substantial factor in causing the death of George R. Heffelfinger?

ANSWER: YES _X_ NO ___

(b) Has the plaintiff, Emma F. Stahler, Administratrix of the Estate of Leonard R. Stahler, Sr., proved by a preponderance of the evidence that the negligence of Stone & Webster Engineering Corporation (which you found to exist by your "YES" answer to

question 1) was a substantial factor in causing the death of Leonard R. Stahler, Sr.?

ANSWER: YES X NO ___

(c) Has the plaintiff, Harry Scott Fetterman, proved by a preponderance of the evidence that the negligence of Stone & Webster Engineering Corporation (which you found to exist by your "YES" answer to question 1) was a substantial factor in causing his injury in 1978?

ANSWER: YES X NO ___

If your answer is NO to all three subparts of question 2, return to the courtroom. If you have answered YES to one or more subparts of question 2, proceed to answer question 3.

3. Has Stone & Webster Engineering Corporation proved by a preponderance of the evidence that Hart Metals, Inc. or its employees were negligent and that this negligence constituted a superseding

intervening cause which relieves Stone & Webster Engineering Corporation from liability?

ANSWER: YES ___ NO X

If your answer is YES, return to the courtroom. If your answer is NO, proceed to answer each subpart of question 4 where you have answered the corresponding subpart of question 2 YES.

4. Has Stone & Webster Engineering Corporation proved by a preponderance of the evidence that:

(a) George R. Heffelfinger was contributorily negligent?

ANSWER: YES X NO ___

(b) Leonard R. Stahler, Sr., was contributorily negligent?

ANSWER: YES X NO ___

(c) Harry Scott Fetterman was contributorily negligent?

ANSWER: YES X NO ___

For each NO answer to questions 4(a),

4(b), and/or 4(c) proceed to answer the corresponding subpart of question 7 without answering the corresponding subparts of question 5 and 6. For each YES answer to a subpart of question 4, proceed to answer the corresponding subpart of question 5.

5. Has Stone & Webster Engineering Corporation proved by a preponderance of the evidence that the contributory negligence of:

(a) George R. Heffelfinger was a substantial factor in causing his death?

ANSWER: YES X NO ___

(b) Leonard R. Stahler, Sr., was a substantial factor in causing his death?

ANSWER: YES X NO ___

(c) Harry Scott Fetterman was a substantial factor in causing his injury?

ANSWER: YES X NO ___

Answer question 6 only if you answered YES to at least on subpart of question 5. For

each YES answer to a subpart of question 5, answer the corresponding subpart of question 6. For each NO answer to a subpart of question 5, proceed to the corresponding subpart of question 7.

6(a). Taking the negligence that you found to be a substantial factor in brining about the death fo George R. Heffelfinger as 100 percent, what percentage of that causal negligence was attributable to Stone & Webster Engineering Corporation and what percentage was attributable to George R. Heffelfinger?

Percentage of causal negligence attributable to Stone & Webster Engineering Corp.	90 %
Percentage of causal negligence attributable to George R. Heffelfinger (answer only if you have answered YES to question 5(a))	10 %
TOTAL	100%

(b) Taking the negligence that you found to be a substantial factor in bringing about the death of Leonard R. Stahler,

Sr., as 100 percent, what percentage of that causal negligence was attributable to Stone & Webster Engineering Corporation and what percentage was attributable to Leonard R. Stahler, Sr.?

Percentage of causal negligence attributable to Stone & Webster Engineering Corp.	90 %
Percentage of causal negligence attributable to Leonard R. Stahler, Sr. (answer only if you have answered YES to question 5(b))	10 %
TOTAL	100%

(c) Taking the negligence that you found to be a substantial factor in bringing about the injury of Harry Scott Fetterman as 100 percent, what percentage of that causal negligence was attributable to Stone & Webster Engineering Corporation and what percentage was attributable to Harry Scott Fetterman?

Percentage of causal negligence attributable to Stone & Webster Engineering Corp.	90 %

Percentage of causal negligence attributable to Harry Scott Fetterman (answer only if you have answered YES to question 5(c)) 10 %

TOTAL 100%

You may not award money damages to an individual or to the administratrix of a decedent's estate where the individual or the decedent was 51 percent or more contributorily negligent. Therefore, do not answer the corresponding subpart of question 7 in any instance where you have found 51 percent or more contributory negligence on the part of Mr. Heffelfinger, Mr. Stahler, and/or Mr. Fetterman.

7. State in dollars the amount of money damages established by a preponderance of the evidence for:

(a) Linda L. Heffelfinger, Administratrix of the Estate of George R. Heffelfinger, Deceased, and Linda L. Heffelfinger, in her own right. $400,000

(b) Emma F. Stahler, Administratrix of the Estate of Leonard R. Stahler, Sr., Deceased, and Emma F. Stahler, in her own right. $115,000

(c) Harry Scott Fetterman $300,000

DATED: July 22, 1981

We, the undersigned, members of the jury, certify that the foregoing answers to interrogatories are the unanimous decision of the jury.

[Signatures of all ten jurors appear in in space.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA L. HEFFELFINGER, Administratrix of the Estate of George R. Heffelfinger, Deceased, and LINDA L. HEFFELFINGER in her own right	:	C.A.No. 79-1140
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
EMMA F. STAHLER, Administratrix of the Estate of Leonard R. Stahler, Deceased, and EMMA F. STAHLER, in her own right	:	C.A.No. 79-1141
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	
HARRY SCOTT FETTERMAN	:	
v.	:	
STONE & WEBSTER ENGINEERING CORPORATION	:	C.A.No. 79-3769

O R D E R

AND NOW, this 22 day of January, 1982,

IT IS ORDERED that:

1. The motion of defendant, Stone & Webster Engineering Corporation for judgment notwithstanding the verdict or, in the alternative, for a new trial is DENIED.

2. The verdicts of the jury dated July 22, 1981, are amended to read as follows:

(a) In the Heffelfinger case No. 79-1140, the verdict shall be changed to read a total of $360,000, plus ten percent per annum interest to run from October 15, 1979, to the date of verdict, July 22, 1981.

(b) In the Stahler case No. 79-1141, the verdict shall be changed to read a total of $103,500, plus ten percent per annum interest to run from October 15, 1979, to the date of verdict, July 22, 1981.

(c) In the Fetterman case No. 79-3769, the verdict shall be changed to read a total of $270,000, plus ten percent

per annum interest to run from October 18, 1979, to the date of verdict, July 22, 1981.

3. Judgments are hereby entered in favor of plaintiffs and against defendant Stone & Webster in the amounts as stated in paragraph 2 herein.

BY THE COURT:

_____

Edward N. Cahn, J.

UNITES STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-1131

HEFFELFINGER, LINDA L., ADMINISTRATRIX OF THE ESTATE OF GEORGE R. HEFFELFINGER, Deceased, and LINDA L. HEFFELFINGER, in her own right

v.

STONE & WEBSTER ENGINEERING CORPORATION and SHICK TUBE-VEYOR CORP.
(D.C. Civil No. 79-1140)

STAHLER, EMMA F., ADMINISTRATRIX OF THE ESTATE OF STAHLER, SR., LEONARD R., Deceased and STAHLER, EMMA F., in her own right

v.

STONE & WEBSTER ENGINEERING CORPORATION and SHICK TUBE-VEYOR CORP.
(D.C. Civil No. 79-1141)

FETTERMAN, HARRY SCOTT

v.

STONE & WEBSTER ENGINEERING CORPORATION and SHICK TUBE-VEYOR CORP.
(D.C. Civil No. 79-3769)

Stone & Webster Engineering Corp.,
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania
Dist. Judge: The Honorable Edward N. Cahn

Submitted Under Third Circuit Rule 12(6)
September 29, 1982
Before: ALDISERT and HIGGINBOTHAM,
Circuit Judges, and
MEANOR, District Judge.*

JUDGMENT ORDER

After considering all contentions raised by appellant, and after considering the opinion of the Supreme Court of Pennsylvania in Heckendorn v. Consolidated Rail Corp., _____ Pa. _____ (Sept. 19, 1983), affirming Heckendorn v. Consolidated Rail Corp., 293 Pa. Super. 474, 439 A.2d 674 (1981), and decision in this appeal having been reserved only for the resolution of Point VI of appellant's brief presenting the Heckendorn issue, it is

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

BY THE COURT,

_____
Circuit Judge

[Judgment order is continued]

* Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by designation, participated in the decision of the panel affirming the judgment of the district court, on all issues except the reservation of Point VI of appellant's brief. Judge Meanor is no longer an active member of the federal judiciary and did not participate in the issuance of the present judgment order.

Attest:

_____

Sally Mrvos, Clerk

DATED: OCT 11, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 82-1131

HEFFELFINGER, Linda L., Administratrix of the Estate of GEORGE R. HEFFELFINGER, Deceased, and LINDA L. HEFFELFINGER, in her own right, etc., et al.

v.

STONE & WEBSTER ENGINEERING CORP. and SHICK TUBE-VEYOR CORP.,

Appellant

(E.D. Pa.Civ.Nos. 79-1140, 79-1141 and 79-3769)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges, and MEANOR, District Judge.*

The petition for rehearing filed by APPELLANT in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: NOV 14, 1983 _____
Judge

[Sur Petition for Rehearing continued]

* Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by designation, participated in the decision of the panel affirming the judgment of the district court, on all issues except the reservation of Point VI of appellant's brief. Judge Meanor is no longer an active member of the federal judiciary and did not participate in the issuance of the present judgment order.

CORPORATE AFFILIATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT OF THE UNITED STATES RULE 28.1

Petitioner, Stone & Webster Engineering Corporation, is a Massachusetts corporation and is a wholly owned subsidiary of Stone & Webster, Inc., a Delaware corporation, of which the principal place of business is 90 Broad Street, New York, New York.